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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

5:01-CR-418

ANDRE PARKER A/K/A "DOCTOR" PARKER; PARKER ENVIRONMENTAL MANAGEMENT GROUP, INC.,

Defendants.

APPEARANCES	OF COUNSEL
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MEMORANDUM-DECISION AND ORDER

NORMAN A. MORDUE, District Judge:

I. Introduction

Defendants are charged in a multi-count indictment with conspiracy to violate provisions of both the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and the

Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, various substantive CAA and CERCLA violations, obstruction of justice, perjury, mail fraud and false claims. This case stems from defendants' involvement in the removal of asbestos from two housing projects in Plattsburgh, New York, owned by the Plattsburgh Housing Authority ("PHA"). Defendants conducted asbestos abatement activities at the housing projects pursuant to contracts with PHA in August 2000 and February 2001. The government alleges that defendant Andre Parker a/k/a "Doctor" Parker, the owner of defendant Parker Environmental Management Group, Inc. ("PEMG") directed his employees to perform asbestos abatement work "illegally, under severe time limitations, and in a manner that exposed them to high levels of asbestos dust." Further, the government asserts that Parker directed his on-site supervisor at the projects to illegally dump large quantities of asbestos in numerous locations throughout the City of Plattsburgh. The government contends that during the course of its grand jury investigation into defendants' activities, defendant Parker obstructed justice by providing false documents which were subpoenaed, failing to fully comply with the subpoena and offering perjured testimony. Finally, the government alleges that defendant Parker falsified the credentials of his laboratory director and falsified and mailed laboratory sample results that "grossly" under-reported levels of asbestos contamination.

The asbestos abatement work at issue occurred during August 2000 at one apartment building in a PHA complex known as "John Collins Park" and in February 2001 at numerous buildings throughout the "John Collins Park Extension" and another PHA complex known as "Thomas Conway Apartments." According to an affidavit from Dennis Lee, the Rehabilitation Coordinator for PHA, PHA owns and operates approximately 67

buildings at various sites throughout the City of Plattsburgh containing a total of 606 rental units. The 67 buildings owned and operated by PHA are part of seven overall housing projects or sites maintained by PHA in the course of its operations. Each of the seven projects or sites has a numerical designation -- 18-1 through 18-7 -- since PHA was the eighteenth public housing project jointly funded by the United States government and New York State. John Collins Park and John Collins Park Extension, a/k/a 18-1 and 18-2, comprise a single housing complex consisting of 41 contiguous/adjacent buildings. The buildings are constructed in the format of row houses with each building having either eight one bedroom units, four two bedroom units, six three bedroom units or five four bedroom units. Thomas Conway Apartments, designated as 18-3, is comprised of 8 buildings containing a total of 51 apartment units.

According to Mr. Lee, in October 1999, it was suggested to PHA by a representative of Griffin International, Inc. ("Griffin"), one of PHA's environmental consultants, that the housing authority conduct a large scale project to remove wide-spread asbestos contamination throughout the apartment buildings in John Collins Park. Mr. Lee discussed the proposal with the director of PHA who suggested that the work would have to be budgeted incrementally in the year 2000 and perhaps 2001 if needed. In the spring of 2000, PHA solicited bids from contractors to conduct asbestos abatement work in Building 13-B of John Collins Park (18-1). Building 13-B contained four residential units. After one contractor won the bid but failed to appear and conduct the work, PHA entered into a

contract with PEMG on August 21, 2000.[1] According to the contract, defendants were to "achieve substantial completion" of the asbestos abatement work within 30 days. In December 2000, PHA contracted with Griffin to solicit bids for removal of asbestos from the crawl spaces in 32 residential buildings at John Collins Park and John Collins Park Extension (18-1 and 18-2), one maintenance building at John Collins Park and another maintenance building at Thomas Conway Apartments (18-3). PEMG won the bid for the second project and signed the contract documents with PHA in February 2001 after which work began immediately.

Presently before the Court is an omnibus motion by defendants seeking: 1) dismissal of all portions of the indictment premised upon the CAA; 2) dismissal of the perjury count; 3) preclusion of evidence pursuant to Fed. R. Crim. P. 404(b); 4) additional discovery including a bill of particulars, grand jury transcripts and *Brady* material; and finally 5) dismissal of the indictment based on alleged prosecutorial misconduct. In connection with the perjury charge, the government has agreed to voluntarily dismiss this count of the indictment against defendant Parker. However, the government opposes the balance of defendants' motions and moves for reciprocal discovery including disclosure of *Jencks* Act material. The Court will address the various requests for relief *seriatim*.

II. Discussion

A. CAA Overview

The CAA authorizes the Administrator of the Environmental Protection Agency

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[1] According to Mr. Lee, PHA gave defendants the opportunity to bid on the asbestos abatement contract after PEMG had successfully bid on a separate lead removal project for PHA.

("EPA") to promulgate national emission standards for the handling of hazardous air pollutants ("NESHAP"). *See* 42 U.S.C. § 7401 *et seq.*; *United States v. Hugo Key and Son, Inc.*, 731 F.Supp. 1135, 1140 (D.R.I. 1989). "The NESHAP for asbestos was promulgated in 1973 after extensive evaluation and public comment, and is currently set forth at 40 C.F.R. part 61, Subpart M." *Id.* The CAA's asbestos NESHAP regulations impose various notification, handling and disposal requirements for covered demolition and renovation operations involving regulated asbestos-containing material ("RACM.") *See* 42 U.S.C. § 7412(h)(1); 40 C.F.R. §§ 61.140, 61.145 and 61.150. In order to establish civil liability under the asbestos NESHAP, the government must establish that (1) the CAA and the asbestos NESHAP apply to defendant; and (2) that defendant failed to comply with requisite requirements. *United States v. Midwest Suspension and Brake*, 824 F.Supp. 713, 725 (E.D.Mich. 1993). However, the CAA also provides criminal liability for "knowing" violations of the Act. *See* 42 U.S.C. § 7413(c)(1). A demolition or renovation project must occur at a covered "facility" as defined by the regulations and involve at least 260 linear feet, 160 square feet or 35 cubic feet of RACM for the EPA's NESHAP regulations to apply. *See* 40 C.F.R. §§ 61.141 and 61.145. Defendants are charged with conspiracy to violate NESHAP and with violations of the regulations as well.

B. Dismissal of CAA Counts

Defendants contend that dismissal of counts 1-13 of the indictment is warranted since the PHA projects were not "facilities" within the meaning of NESHAP nor did the asbestos abatement work in the subject contracts satisfy the threshold requirements of 40 C.F.R. § 61.145. The Court addresses the former argument first.

1. Applicability of 40 C.F.R. § 61.141

According to the subject regulations, "[f]acility means any institutional, commercial, public, industrial, or residential structure, **installation**, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units)." 40 C.F.R. § 61.141 (emphasis added). "Installation means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control)." *Id.* Defendants contend that: 1) since the earlier of the two asbestos abatement projects at issue herein was conducted at one apartment building owned by PHA which had only four residential units; and 2) since the balance of the work they performed involved only four-unit apartment buildings, the work which is the subject of the indictment falls under the residential exemption to the applicability of the asbestos NESHAP.

The government concedes that the August 2000 asbestos abatement work performed by defendants in Building 13-B at John Collins Park involved only four apartment units and that a substantial portion of the work that occurred in February 2001 involved four-unit apartment buildings. However, the government counters that the abatement work in Building 13-B was done within an "installation" as that term is defined by the regulations and therefore is outside the residential exemption referred to by defendants. To wit, the government asserts that Building 13-B was only the "first of many" buildings in John Collins Park, John Collins Park Extension and Thomas Conway Apartments which was scheduled for renovation. Because the work done by defendants in August 2000 and February 2001 was part of a large scale renovation site at John Collins Park and Thomas

Conway Apartments, the government argues that both projects are covered by 40 C.F.R. § 61.141.

The government's position is not without support. In 1989, EPA published its intent to revise the asbestos NESHAP after a hearing and period for public comment. In February 1990, EPA published the rule revision in the Federal Register. The purpose of the revision was "to enhance enforcement and promote compliance with the current standard without altering the stringency of existing controls." *National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision,* 55 Fed. Reg. 48406, 48412 (November 20, 1990). The revisions revised and added several definitions in order to clarify the requirements of the NESHAP, particularly with respect to the residential exemption. The preamble accompanying the revisions also contained clarifying information regarding the definition of "facility" as follows:

> **Comment:** Several commenters argued that the exclusion of residential facilities having four or fewer dwelling units should be eliminated. Commenter IV-D-89 asserted that residential demolition and renovation and associated waste disposal involve significant quantities of asbestos and should be regulated. Commenter IV-D-54 argued that residential buildings having four or fewer units should not be exempt from the work practices provisions even if they are exempt from the notification requirements. Commenter IV-D-94 recommended that only facilities with one dwelling unit be excluded because renters of apartments are frequently exposed as a result of asbestos work performed by untrained workers.
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> **Response:** The recommendation to remove the exemption for residential facilities having four or fewer dwelling units would expand the scope of the rule. Revisions that alter stringency may be considered during a later rulemaking. However, EPA does not consider residential structures that are demolished or renovated as part of a commercial or public project to be exempt from this rule. For example, the demolition of one or more houses as part of an urban renewal project, a highway

construction project, or a project to develop a shopping mall, industrial facility, or other private development, would be subject to the NESHAP. Nor would the conversion of a hotel or large apartment building to a condominium, a cooperative, or a loft exempt the structure from the NESHAP. To clarify that condominiums, cooperatives, and lofts which exceed four dwelling units are subject to the NESHAP, the definition of facility has been modified accordingly. The owner of a home that renovates his house or demolishes it to construct another house is not to be subject to the NESHAP.

National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision, 55 Fed. Reg. 48406, 48412 (November 20, 1990). With respect to an "installation" as defined by 40 C.F.R. § 61.141, EPA stated as follows:

> **Comment:** Commenter IV-D-83 argued that the definition of "installation" needs clarification and asks whether a group of residential buildings would be excluded. The commenter argued that a group of residential buildings at one location being demolished or renovated by one developer should be covered.
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> **Response:** A group of residential buildings under the control of the same owner or operator is considered an installation according to the definition of "installation" and is, therefore, covered by the rule. As an example, several houses located on highway right-of-way that are all demolished as part of the same highway project would be considered an "installation," even when the houses are not proximate to each other. In this example, the houses are under the control of the same owner or operator, i.e., the highway agency responsible for the highway project.

Id. In 1995, EPA published "Asbestos NESHAP Clarification of Intent" in the Federal Register. There, EPA commented:

> Since the publication of the 1990 revisions to the asbestos NESHAP, certain questions have arisen regarding whether demolitions or renovations of residential homes that are demolished or renovated by municipalities for reasons of public health, welfare or safety ("nuisance abatement demolitions") are covered by the asbestos NESHAP. . . . Several municipalities have stated that they believe such demolitions or renovations to

be excluded from the NESHAP under the residential building exemption. Municipalities have also stated that EPA officials have been inconsistent in their determinations of this issue. . . . In an effort to clarify this issue for the regulated community, EPA is presenting this notice giving its interpretation of the NESHAP with regard to this issue.

60 Fed. Reg. 38725, 38726 (July 28, 1995). In connection with clarification of the residential exemption, EPA stated:

EPA believes that individual small residential buildings that are demolished or renovated are not covered by the asbestos NESHAP. This is true whether the demolition or renovation is performed by agents of the owner of the property or whether the demolition or renovation is performed by agents of the municipality. EPA believes that the residential building exemption applies equally to an **individual small residential building** regardless of whether a municipality is an "owner or operator" for the purposes of the demolition or renovation. EPA believes that the exemption is based on the type of building being demolished or renovated and the type of demolition or renovation project that is being undertaken, not the entity performing or controlling the demolition or renovation.

However, EPA believes that **the residential building exemption does not apply where multiple (more than one) small residential buildings on the same site** [FN3] **are demolished or renovated by the same owner or operator as part of the same project or where a single residential building is demolished or renovated as part of a larger project that includes demolition or renovation of non-residential buildings.** The definition of facility specifically includes "any residential structure, installation or building" but excludes only "residential buildings having four or fewer dwelling units" [emphasis added]. . . . Specifically not excluded from the definition of facility were residential installations. **EPA believes that the fact that the residential building exemption is limited to residential buildings, and does not include residential installations, shows that the residential building exemption was not designed to exempt from the NESHAP demolitions or renovations of multiple buildings at a single site by the same owner or operator.** Moreover, to the extent the regulations are ambiguous, EPA believes the language of the preamble to the 1990 regulations quoted above makes clear that

the Agency interpreted the residential building exemption not to include the demolition of a group of residential buildings on the same site under the control of the same owner or operator. The preamble also notes that demolitions of residential buildings as a part of larger demolition projects (e.g. construction of a shopping mall) are not excluded from the NESHAP. EPA believes that this interpretation is consistent with the original purpose of the residential building exemption, which was to exempt demolitions or renovations involving small amounts of asbestos. **EPA does not believe the residential building exemption was designed to exempt larger demolitions or renovations on a particular site, even where small residential buildings are involved.** [FN4]

FN3 The term "site" is not defined in the regulations and EPA does not intend to provide any determination of the boundaries of a "site" in today's clarification. However, to provide guidance, EPA notes that a "site" should be a relatively compact area. In EPA's view, an entire municipality, or even a neighborhood in a municipality, should not be considered a single site. Where an area is made up of multiple parcels of land owned and operated by various parties, EPA believes that parcels on the same city block may be considered as a single site. (Where a site can not be easily defined as a city block, the site should be a comparably compact site. In any event, the local government should use common sense when applying this guide.) Obviously, EPA believes that if a demolition project involves the demolition of several contiguous city blocks, the entire area could be considered a site. However, EPA believes that demolition of two individual residences separated by several city blocks should not be considered a demolition on a single site. In EPA's view, the area of a site may be larger where the area is owned and operated as a unitary area by a single owner/operator (e.g. a shopping mall or amusement park).

FN4 EPA notes that 40 C.F.R. 61.19 forbids owners and operators from attempting to circumvent any NESHAPs by carrying out an operation in a piecemeal fashion to avoid coverage by a standard that applies only to operations larger than a specified size.

Id. (emphasis added). EPA also noted that it "consider[ed] demolitions planned at the same time or as part of the same planning or scheduling period to be part of the same project. In

the case of municipalities, a scheduling period is often a calendar year or fiscal year or the term of a contract." *Id.*

The question of what weight to give EPA's interpretation of its own regulations is easily answered. "Generally, courts defer to an agency's construction of the statutory scheme it is charged to administer." *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The *Chevron* doctrine accords substantial deference, upholding the agency's construction unless "it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Courts should overturn an agency's interpretation only if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Id.*

In the present case, defendants have offered no case law or administrative authority to support their position that EPA regulations do not apply to the work they performed in August 2000 and February 2001 at PHA's John Collins Park and Thomas Conway Apartments. In contrast, it is clear from administrative materials published by EPA that the asbestos NESHAP was intended to apply to public housing projects where renovation of residential buildings occurs in the context of an asbestos abatement plan.[2] There is sufficient evidence in the record to establish that the August 2000 and February 2001

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[2] In addition, the government makes conclusory factual averments and submits a copy of a notification form completed by defendant Parker in support of its argument that defendant Parker knew or should have known that PEMG's activities at the PHA properties were governed by EPA regulations. If proven, these facts might provide evidence of defendants' intent to violate the CAA. However, they are clearly are irrelevant to whether the CAA and its attendant regulations apply in the first instance.

asbestos abatement work performed by defendants was clearly planned or discussed by PHA as part of a large scale renovation project. The projects were completed within a six month period and both projects involved work at John Collins Park (18-1) though the later project extended to John Collins Park Extension (18-2) and Thomas Conway Apartments (18-3). Thus the Court is satisfied that the August 2000 and February 2001 work performed by defendants at John Collins Park and Thomas Conway Apartments occurred at a residential "installation" as that term is defined by EPA. Defendants are thereby not protected by the residential exemption to the asbestos NESHAP and were subject to EPA regulations when they conducted asbestos abatement work at a covered "facility" – building 13-B at John Collins Park -- in August 2000 and at several covered "facilities" during February and March 2001 at John Collins Park, John Collins Park Extension and Thomas Conway Apartments.

2. Applicability of 40 C.F.R. § 61.145

Defendants contend that the asbestos abatement work they performed as part of the February 2001 project did not satisfy the "threshold amount" of asbestos required to be present for 40 C.F.R. § 61.145 to apply. To wit, defendants argue that even though they removed asbestos material from multiple buildings during the February 2001 project, no one building involved removal of more than 260 linear feet of asbestos material - the amount required to trigger the regulation. This argument is easily defeated by reference to the following CAA regulation entitled "Circumvention:"

> No owner or operator shall build, erect, install, or use any article machine, equipment, process, or method, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous dilutants to achieve

> compliance with a visible emissions standard, and the piecemeal carrying out of an operation to avoid coverage by a standard that applies only to operations larger than a specified size.

40 C.F.R. § 61.19. This rule clearly belies any intent by EPA to avoid regulation of a large-scale renovation project conducted by removing small amounts of asbestos from several individual buildings. Furthermore, when it published its intent to revise the asbestos NESHAP in 1988, EPA stated as follows:

> "Installation" is defined as a building or group of buildings at a demolition or renovation site. This definition is added to clarify the existing applicability requirements for demolition or renovation. For purposes of determining the amount of asbestos to be stripped or removed, the amounts of asbestos in a group of buildings to be demolished or renovated are **summed.**

Asbestos NESHAP Revision, Including Disposal of Asbestos Containing Materials Removed From Schools, 54 Fed. Reg. 912, 922 (January 10, 1989) (emphasis added). Thus the Court finds that defendants were subject to 40 C.F.R. § 61.145 when they performed asbestos abatement work in February and March 2001 at various apartment buildings owned by PHA.

3. Vagueness Challenge to 40 C.F.R. §§ 61.140 and 61.145

Defendants argue that even if the Court cannot rule as a matter of law that defendants were not subject to the asbestos NESHAP when they performed asbestos abatement work for PHA in August 2000 and February 2001, the regulations are unconstitutionally vague. Specifically, defendants contend that the definition of "facility" as defined by the CAA regulations is vague and ambiguous. Further, they charge that the regulations are unconstitutionally vague concerning the calculation of the threshold amount of asbestos material required to trigger application of NESHAP.

As stated by the Supreme Court in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), "[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." To show a statute is unconstitutionally vague on its face, "[t]he complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has no core.' " *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 7 (1982) (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (citation omitted)). In other words, an enactment is void for vagueness when it is impermissibly vague in all of its applications. *Hoffman Estates*, 455 U.S. at 494-95. The degree of vagueness tolerated by the Constitution depends on the nature of the enactment. *Id.* at 498.[3]

"Vagueness challenges outside the context of the First Amendment are to be examined in light of the facts of the case, on an as-applied basis." *United States v. Powell*, 423 U.S. 87, 92 (1975); *see also United States v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29, 32-33 (1963) ("[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is

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[3] For example, because of the very nature of asbestos and other hazardous substances, individuals dealing with them have constitutionally adequate notice that they may incur criminal liability for emissions-related actions. *See United States v. Int'l Minerals and Chem. Corp.*, 402 U.S. 558, 565 (1971). "[W]here ... dangerous or deleterious ... products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.*

proscribed"; sufficiency of notice is to be determined by "examin[ing the statute] in the light of the conduct with which a defendant is charged"). To determine whether a statute is unconstitutionally vague as applied, the Supreme Court has articulated a two-part test: the court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and then consider whether the law "provide[s] explicit standards for those who apply [it]." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (footnote omitted); *see also Hoffman Estates*, 455 U.S. at 498.

Defendants' contention that 40 C.F.R. §§ 61.140 and 61.145 are unconstitutionally vague lacks merit. There is nothing ambiguous or vague about the definition of "facility" as it appears in the asbestos NESHAP. Furthermore, to the extent that defendants contend that the requirement of combining asbestos removed from various buildings in an abatement project is vague and/or ambiguous, one need only refer to the definition of an "installation" as set forth in the regulations as well as 40 C.F.R. § 61.19 which proscribes circumvention of the threshold requirements via performing abatement work on a piecemeal basis to understand that renovation work such as that performed by defendants for PHA was governed by the asbestos NESHAP.

4. Vagueness Challenge to 40 C.F.R. § 61.150(a)(1)(iv)

Defendants also raise a facial challenge to 40 C.F.R. § 61.150(a)(1)(iv), the regulation requiring specified warning labels for containers used to dispose of RACM. Defendants alleged failure to comply with this regulation is the basis of counts 6 and 12 of the indictment. Defendants' argument for dismissal of these two counts is based on an obvious typographical or clerical error in the subject regulation. To wit, 40 C.F.R. § 61.150(a)(1)(iv) requires an owner or operator to label asbestos containers or wrapped

materials "using warning labels specified by Occupational Safety and Health Standards of the Department of Labor, Occupational Safety and Health Administration ("OSHA") under 29 C.F.R. 1910.1001(j)(2) or 1926.58(k)(2)(iii). The labels shall be printed in letters of sufficient size and contrast so as to be readily visible and legible."

It is apparent from review of the administrative history of the regulations that OSHA updated the above-referenced regulations in 1994, adding two provisions to 29 C.F.R. § 1910.1001(j) and deleting 29 C.F.R. § 1926.58(k)(2)(iii). However, when the agency added two new provisions to 29 C.F.R. § 1910.1001(j), it simply moved the labeling regulation - previously set forth in § 1910.1001(j)(2) - to § 1910.1001(j)(4). The new provision now set forth in § 1910.1001(j)(2) has nothing to do with labeling requirements. As a further matter, the alternative OSHA regulation referenced by the asbestos NESHAP - 29 C.F.R. § 1926.58(k)(2)(iii) - no longer exists. Thus, when one refers to OSHA's regulations as directed by the asbestos NESHAP to ascertain the labeling required for RACM, one is misdirected by EPA's having failed to update and/or reconcile the asbestos NESHAP with the new OSHA provisions. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. As a result of the above-described error, the asbestos NESHAP is more than vague concerning labeling requirements. Indeed, the regulation provides no guidance at all concerning the type and content of required labeling other than stating that the "labels shall be printed in letters of sufficient size and contrast so as to be readily visible and legible" 40 C.F.R. § 61.150(a)(1)(iv). For RACM to be transported off-site, the regulations state only that containers must be labeled "with the name of waste generator and the location at which the waste was generated." *Id.* at § 61.150(a)(1)(v).

The government's citation to case law holding that minor typographical errors in an indictment do not render the indictment invalid are inapposite to the present case in which defendants are being charged criminally with violating a regulation which contains an obvious error. The government's argument that anyone looking for 29 C.F.R. § 1910.1001(j)(2) would find § 1910.1001(j)(4) on the same page is irrelevant to whether the enactment is vague as a matter of law. When the Court "examin[es the regulation] in the light of the conduct with which [defendants are] charged"), *see Nat'l Dairy Prod. Corp.*, 372 U.S. at 32-33, it reaches the inescapable conclusion that the regulation provides little or no guidance concerning the content of the label. Thus, defendants' alleged failure to label the RACM containers in accordance with the regulation cannot be the subject of a criminal prosecution. The government has cited no authority nor has the Court's extensive research revealed any for the proposition that a defendant may be held criminally responsible for violating a labeling regulation which in error refers to: a) not a labeling requirement but an administrative one; and b) a labeling requirement which was eliminated by OSHA in 1994.

The government asserts that defendant Parker - a seasoned businessman in the asbestos abatement industry with many years of experience - could not possibly have been confused by the error in the regulations. Indeed, the government's counsel asserted that defendants purchased and used bags with the required labels on them, that these bags were commercially available to any company in the abatement industry and that defendants actually turned the bags with the required labels inside out to ensure their attempts to illegally dump RACM was not detected. If true, these allegations might provide a basis for the Court to determine that defendants could be found criminally liable for violating the labeling regulation in spite of its vagueness. That is, the regulation in question required

defendants to use some type of prescribed label. And if the RACM was to be taken off-site, defendants were required to place a label on the containers which at the very least included the name of the waste generator and the location where the waste was generated. Thus, defendants' argument that the regulation did not alert them to the possibility of criminal liability is belied by their alleged use of bags with no labels or hidden labels. However, an assistant United States Attorney is not qualified to provide factual averments to the Court concerning defendants' alleged illegal activities in the absence of setting forth the basis of his personal knowledge of same.

As a further matter, the affidavit of the Special Agent of the EPA who actually did investigate defendants' activities referred to by the government's counsel is vague and conclusory on the issue of whether and how defendants used labels on containers when disposing of RACM in this case. To wit, Agent Dwyer states as follows:

> With regard to Defendants' claim of vagueness relating to the NESHAP requirement to mark bags with asbestos warning labels, your affiant advises that such warning labels were present on many such PEMG bags, thus demonstrating knowledge of, and a lack of confusion about, the warning requirement. However such labels were not displayed on bags discarded by PEMG employees containing friable asbestos that your affiant discovered discarded in various unpermitted locations throughout Plattsburgh, NY.

The above averment does not clearly establish that defendants used **no** labeling whatsoever on bags illegally discarded, only that they did not use the "required labels."

Based thereupon, defendants' motion to dismiss counts 6 and 12 of the indictment based on the void-for-vagueness doctrine is GRANTED while the balance of defendants' request to dismiss those portions of the indictment premised upon violations of the CAA must be DENIED.

C. Government's Use of 404(b) Evidence

Rule 404(b) of the Fed. R. Evid. allows the admission of evidence of other crimes, wrongs or acts for purposes including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). The Rule also requires that "the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to use at trial." *See* Fed. R. Evid. 404(b); *see also United States v. Paccione*, 949 F.2d 1183, 1199 (2d Cir. 1991). The government has provided with the required notice of its intent to introduce various evidence relating to instances in which defendants allegedly falsified test results, documents, engaged in conduct proscribed by the CAA and attempted to influence the grand jury investigation of this case. Defendants assert that none of this evidence is relevant to any disputed material issues in this case. The Court is hindered in any effort to rule on evidentiary questions outside a factual context. The pre-trial evidentiary hearing desired by defendants on this issue would likewise be impossible to conduct in the absence of the Court's knowledge concerning what defenses will be raised at trial. Accordingly, the Court declines to determine any evidentiary issues that may arise under Rule 404(b) outside the context of the trial. Defendants' motion in this regard is DENIED without prejudice and may be renewed at trial.

D. Bill of Particulars

The function of a bill of particulars is to provide the defendant with information about the nature of the charge pending against him, thereby enabling the defendant to prepare for trial and prevent surprise. *See United States v. Torres*, 901 F.2d 205, 234 (2d

Cir.), *cert. denied sub nom. Cruz v. United States*, 498 U.S. 906 (1990); *see also United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987); *United States v. Walker*, 922 F.Supp. 732, 738 (N.D.N.Y. 1996). " 'Whether to grant a bill of particulars rests within the sound discretion of the district court.' " *Torres*, 901 F.2d at 234 (quoting *United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984)). "A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *Torres*, 901 F.2d at 234 (quoting *United States v. Feola*, 651 F.Supp. 1068, 1132 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 857 (2d Cir.), *cert. denied sub nom. Marin v. United States*, 493 U.S. 834 (1989)). Therefore, a bill of particulars is not to be used as a "general investigative tool for the defense." *Feola*, 651 F.Supp. at 1132; *Walker*, 922 F.Supp. at 738. In addition, if the information sought by the defendant is provided in the indictment or is available from some other source, such as discovery, no bill of particulars is required. *See Bortnovsky*, 820 F.2d at 574; *see also Walker*, 922 F.Supp. at 739.

The indictment in this case states the statutes defendants are charged with violating, the relevant dates or time periods, and the nature of the illegal activities at issue. In addition, it appears that the government has provided the defendant with extensive additional discovery materials in accordance with Rule 16 of the Fed. R. Crim. P. which further apprize defendants of the specific charges against them. Although defendants contend that some specific information they seek is not contained in the indictment such as dates and locations where RACM were illegally dumped or released, they do not contend notably that the information is not available from the voluminous other discovery materials provided to them by the government. To the extent that defendants seek the names of

alleged co-conspirators whose identities are not set forth in any discovery materials provided to defendants to date, and to the extent that the government has knowledge of "others" who were involved in the conspiracy, the government must disclose their identities to defendants.

E. *Brady* Material

Defendants request that the government turn over any and all additional information concerning the actions or failures of Griffin, PHA's agent on the asbestos abatement projects at issue herein, which could be deemed exculpatory pursuant to *Brady v. Maryland*, 373 U.S. 383 (1963). The government avers that it has turned over all documentary evidence in its possession concerning Griffin. To the extent that defendants seek documents related to the criminal plea of a Griffin employee in New York State for failing to monitor PEMG's work on the abatement projects at issue herein, the government asserts it does not yet have these documents. The government argues correctly that the documents are in any event, equally available to and obtainable by the defense.

The *Brady* disclosure obligation extends further than the production of documents or records; it attaches to any evidence that is both material and known to the prosecutor. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir.), *reh'g denied*, 136 F.3d 262 (2d Cir. 1998). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Kyles*, 514 U.S. at 438. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Id.* at 437 (emphasis added). The government misapprehends its *Brady* obligations at its own peril and is directed to err, if at all, on the

side of the defendants. The government has stated that it has and will continue to disclose any material exculpatory evidence in its possession upon learning of such evidence. This representation is generally considered sufficient and therefore, the Court will not enter an order regarding *Brady* materials at this time.

F. Grand Jury Transcripts

Under the *Jencks* Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2, the government is not required to disclose statements or grand jury testimony of witnesses it intends to call at trial until after that witness has testified. *See In re United States*, 834 F.2d 283, 286-87 (2d Cir. 1987). Defendants do not specifically seek early production of *Jencks* material, but rather seek transcripts of grand jury testimony for all government witnesses which would essentially constitute an "end run" around the *Jencks* early disclosure rule. Defendants contend that disclosure of said transcripts is required by the Court's pre-trial discovery order which states that the government shall make such materials available to the defense "at a time earlier than required by rule or law, so as to avoid undue delay at trial or hearings." It is the normal practice in the Northern District to require *Jencks* Act material to be handed over shortly before commencement of trial or after a jury is selected for trial. *See United States v. Lopez*, 1999 WL 34969, *6 (N.D.N.Y. Jan. 20, 1999); *United States v. Jennings*, 1998 WL 865617, *4 (N.D.N.Y. Dec. 8, 1998); *United States v. Kipp*, 990 F. Supp. 102, 104 (N.D.N.Y. 1998). The Court has discerned no reason to depart from this rule in the present case. Thus, defendants' motion for disclosure of grand jury transcripts earlier than described above must be DENIED. To the extent that defendants seek pre-trial production of grand jury testimony by persons who were or are employees of defendant PEMG, the government has acknowledged its obligation to produce said transcripts to the defense.

G. Prosecutorial Misconduct

Defendants argue that the entire indictment in this case should be dismissed on the grounds of prosecutorial misconduct. In the first instance, defendants contend that the Assistant United States Attorney assigned to prosecute this matter made inappropriate sexual accusations and racist remarks to a witness whose testimony will allegedly be favorable to the defense. Secondly, defendants contend that defendant Parker was "lured" into testifying before the grand jury as the custodian of defendant PEMG's records and thereby gave testimony under oath without knowledge that he was the "target" of the government's investigation. As a preliminary matter, the Court finds that there is no evidence in admissible form before the Court to support either of the above allegations. Hearsay affidavits from attorneys with no personal knowledge of the facts at issue are not sufficient. In any event, even if defendants had submitted evidence in support of these claims of prosecutorial misconduct, there would be no legal ground to dismiss the indictment. Finally, in connection with defendant Parker's claim of being "hoodwinked" into testifying before the grand jury, he voluntarily appeared as the records custodian for PEMG, he had no legal obligation to testify, he was advised of his constitutional rights including the right against self-incrimination, and was free to confer with his counsel at any time. Based thereupon, defendants' motion for a hearing concerning alleged prosecutorial misconduct as well as the motion for dismissal is DENIED.

III. Conclusion

Based on the foregoing, defendants' application for: (1) dismissal of count 17 of the indictment, alleging perjury, is GRANTED; (2) dismissal of counts 6 and 12 of the indictment is GRANTED; (3) dismissal of all remaining Clean Air Act counts of the

indictment is DENIED; (4) an order directing the government to serve and file a bill of particulars is DENIED; (5) disclosure by the government of any "prior bad acts" evidence it intends to introduce at trial against defendants is DENIED without prejudice; (6) disclosure of *Brady* material is DENIED; (7) an order directing the government to provide early disclosure of grand jury transcripts of its witnesses is DENIED except to the extent that the government acknowledges its obligation to produce transcripts of any witness who was or is an employee of defendant PEMG; and (8) dismissal of the indictment and/or a hearing on the basis of prosecutorial misconduct is DENIED.

IT IS SO ORDERED.

Dated: September 5, 2002
Syracuse, New York

Norman A. Mordue
United States District Judge